

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH H. RONQUILLO,

Defendant.

4:13-CR-3104

ORDER

This matter is before the Court on the defendant's motion to appoint counsel ([filing 70](#)). The defendant's motion will be denied.

The defendant's motion asks for counsel to be appointed to pursue relief under the [First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 \(2018\)](#). Specifically, he wants counsel to file a motion "regarding 'stacking' on charges" under [18 U.S.C. § 924\(c\)](#). [Filing 70 at 1](#). But the First Step Act provisions relating to "stacking" offer no help to the defendant.

The defendant was convicted of one count of possession with intent to distribute 5 grams or more of methamphetamine, in violation of [21 U.S.C. § 841](#), and one count of possession of a pistol in furtherance of a drug trafficking crime, in violation of [§ 924\(c\)](#).¹ [Filing 58 at 1](#). He was sentenced to two consecutive terms of 6 years' imprisonment. [Filing 58 at 2](#).

Section 924(c) establishes a separate offense for using or carrying a firearm in furtherance of a drug trafficking crime or crime of violence, with a

¹ The Court notes that because the defendant possessed a firearm in furtherance of a drug trafficking crime, and not a crime of violence, the Supreme Court's recent decision in [United States v. Davis, No. 18-431, 2019 WL 2570623 \(U.S. 2019\)](#), regarding the constitutionality of [§ 924\(c\)\(3\)\(B\)](#), does not apply to him.

sentence of 5 to 30 years' imprisonment for a first offense (depending on the type of firearm and whether the firearm was merely possessed, or was also brandished or discharged). § 924(c)(1). Section 924(c)(1)(C) also provides that for a second or subsequent offense, a defendant shall be sentenced to a term of 25 years' to life imprisonment (depending on the type of firearm).

But before the First Step Act, it was possible for a defendant to be convicted of a first and second offense under § 924(c) at the same time. *See Deal v. United States*, 508 U.S. 129 (1993); *see generally* Charles Doyle, Cong. Research Serv., R41412, *Federal Mandatory Minimum Sentencing: The 18 U.S.C. 924(c) Tack-On in Cases Involving Drugs or Violence* 9 (2015). Section 403 of the First Step Act, however, amended § 924(c) to eliminate that "stacking," by providing that the enhanced penalty for a second offense applies only when a prior conviction under § 924(c) has become final. § 403(a), 132 Stat. 5194; *see Davis*, 2019 WL 2570623, at *3 n.1; *see generally* Cong. Research Serv., R45558, *The First Step Act of 2018: An Overview* 9 (2019).

That amendment does not help the defendant for two reasons. First, the defendant wasn't convicted of a second or subsequent violation of § 924(c). Rather, he was convicted of a first offense—and that's not the sort of "stacking" that the First Step Act did away with. And second, even if the defendant's convictions had been "stacked," § 403 was not given retroactive effect—that is, the First Step Act expressly provides that the amendments made by § 403 only apply "if a sentence for the offense has not been imposed" at the time the First Step Act was enacted. § 403(b), 132 Stat. 5194. And, of course, the defendant was sentenced well before then.² *See* [filing 58](#).

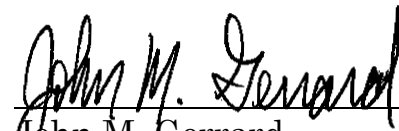
² As an aside, the Court also notes that even the sections of the First Step Act that *were* given retroactive effect only apply to offenses committed before the [Fair Sentencing Act of 2010](#), Pub. L. No. 111-220, 124 Stat. 2372 (2010) took effect—that is, those "committed before

There is no constitutional right to appointed counsel in sentence modification proceedings. *United States v. Harris*, 568 F.3d 666, 669 (8th Cir. 2009). Nor does the defendant have a right to appointed counsel under the Criminal Justice Act, 18 U.S.C. § 3006A. *Harris*, 568 F.3d at 669. Whether to appoint counsel is, therefore, committed to the discretion of the Court. *See id.* The Court declines to appoint counsel in this case because the defendant's basis for filing a motion under the First Step Act would be without merit.

IT IS ORDERED that the defendant's motion to appoint counsel ([filing 70](#)) is denied.

Dated this 8th day of July, 2019.

BY THE COURT:



John M. Gerrard
Chief United States District Judge

August 3, 2010." § 404(a), 132 Stat. 5194. The defendant, however, was sentenced in 2013 for an offense committed on July 23, 2013. [Filing 1](#); [filing 53](#).